No. 79-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE EATON CORPORATION, *Petitioner*

v.

OLGA J. FOX, *Respondent*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

SUPPLEMENTAL MEMORANDUM OF PETITIONER

JOHN L. STRAUCH
1735 Eye Street, N.W.
Washington, D.C. 20006

1700 Union Commerce Bldg.
Cleveland, Ohio 44115
Counsel for the Petitioner

Of Counsel:

STEPHEN J. BROGAN
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

TABLE OF CONTENTS

	Page
New Developments	1
Conclusion	8

TABLE OF AUTHORITIES

	Page
CASES:	
Chappell v. Emco Machine Works Co., 601 F.2d 1295 (5th Cir. 1979)	4
Coke v. General Adjustment Bureau, 616 F.2d 785 (5th Cir. 1980), *decision to reconsider en banc*, 49 U.S. L.W. 1033 (August 26, 1980)	3,4
Harris v. Norfolk & Western Railway Co., 616 F.2d 377 (8th Cir. 1980)	2,3,5
Hiscott v. General Electric Co., 521 F.2d 632 (6th Cir. 1975)	4
International Union of Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229 (1976)	2,3
Mohasco Corp. v. Silver, 100 S.Ct. 2486 (1980)	2,5,6,7
Silver v. Mohasco Corp., 602 F.2d 1083 (2d Cir. 1979)	6,7
Wright v. Tennessee, 613 F.2d 647, *vacated*, 617 F.2d 604 (6th Cir. 1980)	4
Wright v. Tennessee, No. 77-1546 (6th Cir. August 11, 1980) (decided *en banc*)	4
STATUTES:	
29 U.S. C. § 626(d)	3
42 U.S.C. §2000e-5	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1856

THE EATON CORPORATION, *Petitioner*

v.

OLGA J. FOX, *Respondent*

On Petition for Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

---

SUPPLEMENTAL MEMORANDUM OF PETITIONER

NEW DEVELOPMENTS

This supplemental memorandum is filed to call the Court's attention to four recent cases not available when Eaton filed its Petition for Writ of Certiorari in the above-captioned matter. That petition outlined the uncertainty posed by decisions of this Court with respect to the existence and application of the tolling doctrine to Title VII time requirements, and noted the resulting confusion and conflict in approach toward this basic question among the Circuits. The cases discussed herein demonstrate continued confusion among the Courts of Appeals, and

indeed the decision of the Eighth Circuit in one of those cases, *Harris v. Norfolk & Western Railway,* 616 F.2d 377 (8th Cir. 1980), is in direct conflict with the decision of the Sixth Circuit in the instant case. In addition, this Court handed down a decision at the end of last Term in *Mohasco Corp. v. Silver,* 100 S.Ct. 2486 (1980), which adopted an approach to Title VII filing requirements which appears to be at odds with the approach of the Sixth Circuit in the instant case, and which points up the need for further guidance in this area for lower courts.

I.

The Sixth Circuit's decision below, tolling Title VII filing requirements to excuse delay occasioned by the plaintiff's mistakened earlier filing of suit in a state court lacking jurisdiction to hear her claim, is now in conflict with the Eighth Circuit's recent decision in *Harris v. Norfolk & Western Railway,* 616 F.2d 377 (8th Cir. 1980). In *Harris,* the Eighth Circuit, citing this Court's decision in *International Union of Electrical Workers v. Robbins & Meyers, Inc.,* 429 U.S. 229 (1976), refused to toll Title VII time limits to excuse the delay which occurred when the plaintiff mistakenly postponed his Title VII filing to pursue collective bargaining remedies before the National Railroad Adjustment Board. Like the plaintiff in the present case, the plaintiff in *Harris* argued for tolling on the ground that his procedural error was the result of a reasonable mistake, claiming that "he justifiably felt that he was required to take his complaint to the Railroad Adjustment Board before proceeding under the Civil Rights Act of 1964." 616 F.2d at 380.

The plaintiff in *Harris* buttressed his argument by noting that *Robbins & Meyers* had not been decided until four years after his filing with the National Railroad Adjustment Board and by pointing to decided law which clearly required him to exhaust his administrative remedies before filing suit under the collective bargaining agreement. Yet the Eighth Circuit, unlike the Sixth Circuit in the instant case, refused to apply a tolling doctrine to excuse a delay, claimed to have resulted from a reasonable mistake, in the Title VII filing. Instead, the Eighth Circuit held that Title VII claims are independent of other remedies available to aggrieved parties and thus must be pursued separately, stating: "that the time limitations appearing in [Title VII] are jurisdictional is clear." 616 F.2d at 379.

II.

Since the filing of the inital petition, two additional circuits have reexamined the application of the tolling doctrine to the time requirements of the Age Discrimination in Employment Act of 1967 (ADEA). These cases have significance to the instant petition not only because the ADEA time requirements closely parallel Title VII time requirements but also because, as noted in the initial petition, decisions in the Title VII area are often cited as authority for decisions in the ADEA context and vice versa.

In *Coke v. General Adjustment Bureau,* 616 F.2d 785 (5th Cir. 1980), the Fifth Circuit decided that the 180-day notice requirement of 29 U.S.C. § 626(d)(1) is subject to

equitable tolling where a defendant, through misleading conduct, has induced a plaintiff to delay filing suit until the limitations period has run. The Court analogized to its decision in *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979), which held that the parallel notice requirement of Title VII was subject to equitable tolling. Last month, however, the Fifth Circuit decided to reconsider *en banc* its decision in *General Adjustment.* 49 U.S.L.W. 1033 (August 26, 1980).

In *Wright v. Tennessee,* No. 77-1546 (6th Cir. August 11, 1980) (decided *en banc*), the Sixth Circuit, changing its ruling on rehearing and overruling its own precedents, held that ADEA time requirements could be tolled. The Sixth Circuit had held as recently as January, in *Wright v. Tennessee,* 613 F.2d 647 (6th Cir. 1980), that the filing period of that section was a jurisdictional prerequisite to maintaining an action and was therefore not subject to tolling. By reason of its most recent action in *Wright,* the Sixth Circuit overruled its decision in *Hiscott v. General Electric Co.,* 521 F.2d 632 (1975), which it had followed in several later cases. *Hiscott* had held that there was "nothing in the Act nor in its legislative history to indicate that compliance with the notice provision was intended to be tolled or excused." 521 F.2d at 634.

Both the Fifth Circuit's decision in *General Adjustment* and its subsequent action to reconsider, as well as the Sixth Circuit's reversal in *Wright* of its prior position, are further indications of the continued unrest which Courts of Appeals are experiencing in determining the appropriateness of a tolling doctrine in the similar statutory schemes embraced by ADEA and Title VII.

III.

In both the Eighth Circuit case of *Harris v. Norfolk & Western Railway,* 616 F.2d 377 (8th Cir. 1980), and the instant Sixth Circuit case, plaintiffs made mistakes of procedural law which they argued should be excused because the correct course of action was unclear; claiming as well that to apply Title VII requirements to bar claims because of delay due to such mistakes would be harsh and inequitable and would defeat Title VII's general purpose of eliminating discrimination in employment. As was discussed earlier, the Sixth Circuit has accepted such an approach and the Eighth Circuit has rejected it. At the end of last Term, this Court, in *Mohasco Corp. v. Silver,* 100 S.Ct. 2486 (1980), rejected similar arguments, albeit in a slightly different context, and refused to excuse a failure to meet filing deadlines under Title VII.

At issue in *Mohasco* was the interpretation of 42 U.S.C. § 2000e-5(e), requiring that a claim be filed with the EEOC within 300 days of discharge, and of 42 U.S.C. § 2000e-5(c), forbidding the filing of such a claim with the EEOC in a state having its own state agency for the processing of discrimination claims until the state agency resolves the claim or until 60 days after filing with the state agency, whichever is earlier. The plaintiff in *Mohasco* had filed only a claim letter with the EEOC 291 days after discharge, which the EEOC had filed immediately with the appropriate state agency. Thus, when the requisite 60-day period had expired with no action by the state agency, 357 days had elapsed from the date of plaintiff's discharge.

Seeking relief from the 300-day time limit of § 2000e-5(e), the plaintiff argued for different interpretations of

the term "filed" in the two applicable statutory sections. He also argued that an existing EEOC regulation had permitted the very filing he had made. The Second Circuit accomodated the plaintiff and, in language similar to that used by the Sixth Circuit in the instant case to justify its application of a tolling doctrine, stated that excusing the failure to comply with the applicable time requirements was required by "the strong federal policy in ensuring that employment discrimination is redressed. . . ." *Silver v. Mohasco Corp,* 602 F.2d. 1083, 1087 (2d Cir. 1979).

This Court, however, reversed the Second Circuit, holding that the claim was barred, invalidating the EEOC regulation which would have permitted it, and stating that:

> even if the interests of justice might be served in this particular case . . . in the long run experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." 100 S.Ct. at 2497.

Thus, notwithstanding an EEOC regulation which permitted the filing made by the *Mohasco* plaintiff, and despite arguments that a decision which barred the claim would be inequitable and contrary to Title VII's purpose to insure that discrimination in employment is remedied, this Court nonetheless refused to excuse the late filing by the plaintiff in *Mohasco.* Although *Mohasco* provides some further indication of this Court's view of the "jurisdictional" nature of Title VII time requirements, and appears not to accommodate the approach taken by the Sixth Circuit in the instant case, there was no discussion in

Mohasco of the equitable tolling doctrine. Thus, further guidance and clarification is needed with respect to whether tolling of Title VII time requirments is permissible.

The instant case is a perfect opportunity for the Court to provide the needed clarification, and presents for decision a far broader issue than this Court examined when it agreed to review the Second Circuit's decision in *Mohasco.* As important as the *Mohasco* decision was in interpreting certain Title VII time requirements, the ruling of that case is necessarily limited in comparison with the potential impact which a ruling in the instant case could have. *Mohasco* dealt with those limited number of instances when a Title VII plaintiff in a deferral state files his state complaint early enough to be within the 300-day provision of § 2000e-5(e) but late enough to run afoul of § 2000e-5(c). By contrast, the Court has an opportunity in the instant case to clarify, for a far greater number of potential Title VII plaintiffs, the general issue of whether they can be excused for equitable reasons from the consequences of a failure to meet the applicable filing limitations, and if so, what principles should guide lower courts in applying such a tolling doctrine.

CONCLUSION

For all the reasons set forth herein, and in the original petition, this Court should grant certiorari to resolve whether the tolling doctrine is appropriate to the Title VII statutory scheme, and, if so, what the reach and application of that doctrine are.

Respectfully submitted,

JOHN L. STRAUCH
1735 Eye Street, N.W.
Washington, D.C. 20006

1700 Union Commerce Building
Cleveland, Ohio 44115
Counsel for Petitioner

Of Counsel:
STEPHEN J. BROGAN
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

October 1, 1980